

United States
Circuit Court of Appeals
For the Ninth Circuit.

B. J. RUCKER,

Petitioner,

vs.

DAVID H. BLAIR, Commissioner of Internal
Revenue,

Respondent.

Transcript of Record.

UPON PETITION TO REVIEW ORDER OF THE UNITED STATES
BOARD OF TAX APPEALS.

FILED

JAN - 2 1929

PAUL P. O'BRIEN,
CLERK

United States
Circuit Court of Appeals

For the Ninth Circuit.

B. J. RUCKER,

Petitioner,

vs.

DAVID H. BLAIR, Commissioner of Internal
Revenue,

Respondent.

Transcript of Record.

UPON PETITION TO REVIEW ORDER OF THE UNITED STATES
BOARD OF TAX APPEALS.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Answer (Docket No. 3509)	15
Docket Entries (Docket No. 3509)	1
Findings of Fact (Docket Nos. 3508 and 3509) .	17
Notice of Filing and Service of Praeipce for Transcript of Record (Docket No. 3509) ..	36
Opinion (Docket Nos. 3508 and 3509)	24
Order of Redetermination (Docket No. 3509) ..	30
Petition (Docket No. 3509)	3
Petition to Review Decision of United States Board of Tax Appeals (Docket No. 3509) .	31
Praeipce for Transcript of Record (Docket No. 3509)	34

[1*] DOCKET NUMBER 3509.

B. J. RUCKER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

For Taxpayer:

HERBERT E. SMITH, Esq.

W. P. BELL, Esq.

J. B. FOGARTY, Esq.

For Commissioner:

GRANVILLE BORDEN, Esq.

DOCKET ENTRIES.

1925.

Apr. 18—Petition received and filed.

Apr. 23—Copy of petition served on solicitor.

Apr. 23—Notification of receipt mailed taxpayer.

May 13—Answer filed by solicitor.

May 18—Copy of answer served on taxpayer.

Assigned Reserve Calendar.

1927.

Apr. 13—Hearing date set 6-14-27 at Seattle,
Wash.

June 14—Hearing had before Mr. Morris on merits
—consolidated with 3508—Stipula-
tions filed at hearing. Briefs due 9-
15-27.

*Page-number appearing at the top of page of original certified Transcript of Record.

- Aug. 9—Transcript of hearing filed 6-14-27.
- Aug. 31—Motion for extension to Oct. 15, 1927 to file brief filed by G. C. See 2928.
- Sept. 3—Granted to Oct. 15, 1928.
- Sept. 8—Brief filed by taxpayer. See 3508.
- Sept. 29—Brief and findings filed by G. C.
- Nov. 30—Motion that time to file proposed redetermination be set for some date subsequent to 12-20-27, filed by taxpayer. See 2928.
- Dec. 27—Findings of fact and opinion rendered (Morris). Judgment will be entered on 15 days' notice under Rule 50.
- 1928.
- Feb. 8—Notice of settlement filed by taxpayer. Copy served on G. C. 2-11-28.
- Feb. 10—Notice allowing G. C. until 2-28-28 to file settlement for hearing 3-8-28 failure to do so hearing set 3-6-28.
- Feb. 11—Notice of settlement filed by G. C. Copy served 2-15-28.
- Mar. 8—Hearing had before Mr. Morris on settlement.
- Mar. 15—Transcript of hearing 3-8-28 filed. See 2929.
- Mar. 20—Order of redetermination entered.
- Sept. 14—Petition for review by U. S. Cir. Ct. of Appeals, 9th Cir., with assignments of error filed by taxpayer.
- Sept. 14—Proof of service filed.
- Oct. 4—Praecipe of record filed.
- Oct. 4—Proof of service filed by taxpayer.

Now, October 31, 1928, the foregoing docket entries certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[2] Filed Apr. 18, 1925. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 3509.

Appeal of B. J. RUCKER, of Lake Stevens, Wash.

PETITION.

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter (IT:CR:-G-6 60D, GJG.) dated February 27, 1925, and as a basis of his appeal sets forth the following:

1.

The taxpayer is an individual, and a partner in the copartnership of Rucker Bros., Lake Stevens, Washington, which is composed of said taxpayer and his brother, W. J. Rucker of Lake Stevens, Washington, each owning a one-half interest in said copartnership.

2.

The deficiency letter (a copy of which is attached) was mailed to the taxpayer on February 27, 1925, and states a deficiency of \$24,276.97.

3.

The taxes in controversy are income taxes for the calendar year 1919 and are more than \$10,000 to wit, \$24,276.97.

4.

The determination of the tax is based on the following errors:

(Note—The additional assessment as computed by the Commissioner is based upon audits of the returns of B. J. Rucker and Rucker Bros. (a copartnership) made by an agent of the Bureau of Internal Revenue. The errors here to be stated appear in the report of the audit of Rucker Bros. (a copartnership) (No. 3049-W, IT:EN:T-ATW.) dated November 3, 1924, and signed by F. H. Goudy, Supervising Internal Revenue Agent).

[3]

ERROR #1—The Commissioner has added to the income of the partnership \$13,805.10 “Inventory Wire Rope at Camps” (Schedule 1, Items (c) (j) and (k) of above mentioned report).

ERROR #2—The Commissioner has added to the income of the partnership \$11,143.19 “Stumpage Disallowed Camp Boulder” (Schedule 1, Item f, of above mentioned report). The amount should be \$9,853.59.

ERROR #3—The Commissioner has added to the income of the partnership \$12,-

149.29 "Stumpage Disallowed Camp Silvertown" (Schedule 1, item h of above mentioned report). The amount should be \$11,954.84.

ERROR #4—The Commissioner has added to the income of the partnership \$22.55 "Stumpage Disallowed Camp Cavanaugh" (Schedule 1, Item n, of above mentioned report). The amount should be \$19.10.

ERROR #5—The Commissioner has added to the income of the partnership \$2,704.67 "Loss — Sale of Bank Stock" and \$905.33 "Loss Sale of Bonds" (Schedule 1, items q and r respectively of above mentioned report).

ERROR #6—The Commissioner has added to the income of the partnership \$4,467.20 "Panther Lake Contracts 1 and 2 Profits" (Schedule 1 item s of above mentioned report). This should be a deduction of \$131.17 from income.

ERROR #7—The Commissioner has added to the income of the partnership \$2,633.50 "Supply Inventories" (Schedule 1, item x, of above mentioned report).

ERROR #8—The Commissioner has deducted from the income of the partnership \$73.60 “Miscellaneous” which is interest paid (Schedule 1, Item a, m, of above mentioned report). This should be \$673.60.

ERROR #9—The Commissioner has computed the tax on the entire distributive share of B. J. Rucker in the income of Rucker Bros. (a partnership).

5.

The facts upon which the taxpayer relies as the basis of his appeal are as follows:

FACTS RE ERROR #1.

The Commissioner’s report (Schedule 1, Items c j k, pages [4] 3 and 7) states that an analysis of the cost of operating at this camp discloses the fact that these inventories were not reflected as a credit to these costs. This statement is entirely erroneous. The records show that \$13,805.10 was credited to operating accounts.

FACTS RE ERROR #2.

Stumpage disallowed Camp Boulder was \$11,143.19. Stumpage on Logs Cut at Camp Boulder during 1919 was—

Entered in return

as 3,457,398 Feet . \$19,015.69

Should be 3,457,398 Feet @ 2.65 9,162.10

Correct amount of Stumpage Disallow-
 ance\$ 9,853.59

FACTS RE ERROR #3.

Stumpage disallowed Camp Silverton was \$12,-
 149.29. Stumpage on Logs Cut at Camp Silverton
 during 1919 was—

Entered in return

as 2,862,886 Feet \$15,745.87

Should be 2,862,886 Feet @ 1,324. 3,791.03

Correct amount of Stumpage Disallow-
 ance\$11,954.84

FACTS RE ERROR #4.

Stumpage disallowed Camp Cavano was \$22.50.
 Stumpage on Logs Cut at Camp Cavano during
 1919 was—

Entered in return as 6,700 Feet \$ 36.85

Should be 6,700 Feet @ 2.65 17.75

Correct amount of stumpage

Disallowance\$19.10

FACTS RE ERROR #5.

Loss on Sales of Bank Stocks and Bonds—

This stock cost Rucker Bros.....\$9,400.00

The bank owed Rucker Bros. a balance

which was written off as part of the

transaction amounting to 368.30

Rucker Bros. paid to the Bank the difference between the cost and market value of certain bonds, also as part of this sale	905.33
<hr/>	
Carried forward.....	\$10,673.63
[5]	
Brought Forward	\$10,673.63
Rucker Bros. received in cash.....	6,063.63
<hr/>	
Leaving a balance of.....	\$ 4,610.00
The Commissioner allowed a deduction on account of attorney's services of....	1,000.00
<hr/>	
Leaving a further deduction improperly disallowed of	\$3,610.00
<hr/>	
Item (q)	2,704.67
Item (r)	905.33
<hr/>	
	3,610.00

FACTS RE ERROR #6.

The Commissioner has added to Income as profit on sales of timber to Panther Lake Company \$4,-467.20. The gain is as follows:

	Contract #1	Contract #2
Total proceeds of sale.....	305,275.00	51,462.50
Total cost.....	242,721.10	35,580.28
	<hr/>	<hr/>
Total Gain	62,553.90	15,882.22
	<hr/>	<hr/>

Payments received by Rucker	
Bros. in 1919	128,000.00 2,500.00
	<hr/>
	128,000.
	<hr/>
Profit realized 305,275. of \$62,553.90	
on Contract #1	26,228.48
	2,500.00
	<hr/>
Profit realized 51,462.50 of \$15,882.22	
on Contract #2.....	771.54
	<hr/>
Total profit realized in 1919.....	27,000.02
	<hr/>

There was reported in this year in the returns as filed, \$27,131.19, whereas the correct amount of profit which should be allocated to the year 1919 is \$27,000.02. Therefore instead of an addition to income there should be a reduction of income of \$131.17.

FACTS RE ERROR #7.

Item x Schedule 1 of Commissioner's report adds to income \$2,633.50 stating that Supply Inventories were not credited to cost of operations. This is a misstatement of fact. These inventories were credited to cost of operations.

[6]

FACTS RE ERROR #8.

Item (a m) of Schedule 1 of the Commissioner's report shows a deduction from income for interest paid.....73.00

In addition to this amount there was interest paid to—

W. P. Bell	248.95
Northern Pacific Ry. Timber Contract.....	351.05

Total deduction for interest from income should be	\$673.60
---	----------

These two items were charged to timber account but should have been charged to interest, and therefore an additional deduction should be allowed in the amount of \$600.00.

FACTS RE ERROR #9.

During the entire year 1919 B. J. Rucker was a married man living with his wife, Ruby Rucker and said B. J. Rucker had no separate income in the year 1919.

6.

With the exception of Errors #6 and #9, all of the errors alleged in this appeal are questions of fact and not of law, and with respect to Errors #6 and #9, the taxpayer, in support of his appeal, relies upon the following propositions of law:

1. The amount to be reported as income in any year from a sale on the installment plan is that proportion of each payment actually received in that year which the gross profit to be realized when the property is paid for bear to the gross contract price.
2. Under the law and decisions of the courts in the State of Washington, all the property and

all the earnings of either spouse are presumed to be the property and earnings of the marital community, and the burden of proof is on any party claiming that said property or income or any portion thereof is the separate property of one spouse or the other.

WHEREFORE, the taxpayer respectfully prays that this Board may hear and determine his appeal.

(Signed) HERBERT ELLES SMITH.

HERBERT ELLES SMITH, (C. P. A.),
Attorney for the Taxpayer, 1124 White Building,
Seattle, Wash.

[7] State of Washington,
County of Snohomish,—ss.

B. J. Rueker, being duly sworn, says that he is the taxpayer named in the foregoing petition; that he has read the said petition, or had the same read to him, and is familiar with the statements therein contained, and that the facts therein stated are true, except such facts as are stated to be upon information and belief, and those facts he believes to be true.

[Seal] (Signed) B. J. RUCKER.

Sworn to before me this 10 day of April, 1925.

(Signed) J. J. SHEEHAN,
Notary Public.

[8] COPY.

February 27, 1925.

IT:CR:G-6.

GJG.

Mr. B. J. Rucker,
Everett, Washington.

Sir:

The determination of your income tax liability for the taxable year 1919 disclosed a deficiency in the tax amounting to \$24,276.97. The adjustments made are shown in detail in Revenue Agent's Report dated November 3, 1924, a copy of which has been furnished you.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of this letter within which to file an appeal to the United States Board of Tax Appeals contesting in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the enclosed agreement consenting to the

assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:CR:G6-GJG 60D. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR,
Commissioner.

By J. G. BRIGHT,
Deputy Commissioner.

Enclosures:

Statements

Agreements—Form A.

[9] Due to the fact that the statute of limitations will presently bar any assessment of additional tax against you for the year 1919, the Bureau will be unable to afford you an opportunity under the provisions of Treasury Decision 3616 to discuss your case before mailing formal notice of its determination as provided by Section 274 (a) of the Revenue Act of 1924. It is necessary at this time, in order to protect the interests of the Government, either to make an immediate assessment under the provisions of Section 274 (d) of the Revenue Act of 1924 or to issue a formal notice of deficiency.

[10] IT:CR:G-6.

GJG.

STATEMENT OF RETURNS EXAMINED
and
RESULTING TAX LIABILITY.

Returns Examined:

Name.	Year.	Form.	Date Filed.
B. J. Rucker, Lake Stevens, Washington	1919	1040	March 15, 1920
Tax Liability.			

Name.	Year.	Form.	Additional Tax.
B. J. Rucker, Lake Stevens, Washington	1919		\$24,276.97
Computation of Tax.			

Net Income as disclosed by Revenue Agent's report dated November 3, 1924.....	117,180.40
Less: Specific Exemption.....	2,400.00
Income Subject to Normal Tax.....	114,780.40
4% on \$ 4,000.00 equals. \$160.00	
8% on 110,780.40 equals. 8,862.43	9,022.43
	23,510.00
Surtax.	
100,000.00	23,510.00
17,180.40	8,933.81
	32,443.81
Total Tax	\$41,466.24
Less Previously assessed.....	17,189.27
	\$24,276.97
Additional Tax to be assessed	

Now, October 31, 1928, the foregoing petition certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[11] Filed May 13, 1925. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 3509.

In re: Appeal of B. J. RUCKER, Lake Stevens, Washington.

ANSWER.

The Commissioner of Internal Revenue by his attorney A. W. Gregg, Solicitor of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

(1) Admits the allegations contained in paragraphs 1, 2 and 3.

(2) Admits that the Commissioner made the adjustments to taxpayer's income and deduction items as alleged in the petition.

(3) Denies each and every other material allegation of fact contained in the petition.

PROPOSITION OF LAW.

(1) The adjustment made by the Commissioner to taxpayer's income and deduction items for 1919 were proper under the applicable provisions of the Revenue Act of 1918.

(2) Income for 1919 of the taxpayer and his wife has been properly adjusted by the Commissioner.

Wherefore it is prayed that the taxpayer's petition be dismissed and the appeal denied.

A. W. GREGG,
Solicitor of Internal Revenue,
Attorney for Commissioner of Internal Revenue.
Of Counsel:

A. H. FAST,
Special Attorney, Bureau of Internal Revenue.

Now, October 31, 1928, the foregoing answer certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[12] A true copy.

Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET Nos. 3508 and 3509.

Promulgated December 27, 1927.

W. J. RUCKER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

B. J. RUCKER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petitioner B. J. Rucker's distributive share of partnership income held to be separate property under the laws of the State of Washington, and therefore taxable to him.

J. B. FOGARTY, Esq., W. P. BELL, Esq., and
HERBERT E. SMITH, C. P. A., for the Pe-
titioners.

GRANVILLE S. BORDEN, Esq., for the Respond-
ent.

This is a proceeding for the redetermination of deficiencies in income taxes in the amounts of \$24,-276.98 and \$24,276.97 asserted by the respondent against W. J. Rucker and B. J. Rucker, for the year 1919.

This case came on for hearing on June 14, 1927, at which time, it was on motion of the parties, ordered, that the cases of W. J. Rucker, Docket No. 3508, and B. J. Rucker, Docket No. 3509, be consolidated and heard jointly.

The petition of W. J. Rucker raises eight issues identical with eight of the issues raised by the petition of B. J. Rucker, all of which are as follows:

[13] 1. Whether the respondent erred in add-

ing to the income of the partnership of Rucker Brothers, the sum of \$13,805.10, and

2. Whether the respondent erred in adding to income of said partnership the sum of \$11,143.19, and

3. Whether the respondent erred in adding to the income of said partnership the sum of \$12,-149.29, and

4. Whether the respondent erred in adding to the income of said partnership the sum of \$22.55, and

5. Whether the respondent erred in adding to the income of said partnership the sums of \$2,-704.67 and \$905.33, representing certain losses on the sales of stocks and bonds, and

6. Whether the respondent erred in adding to the income of said partnership the sum of \$4,-467.20, and

7. Whether the respondent erred in adding to the income of said partnership the sum of \$2,-633.50, and

8. Whether respondent erred in deducting from the income of said partnership the sum of \$73.60, instead of the sum of \$673.60, and

9. Whether the respondent was in error in computing the tax of B. J. Rucker, a married man, on the entire distributive share of the income of the said partnership.

FINDINGS OF FACT.

The petitioners, W. J. and B. J. Rucker, are brothers, comprising the copartnership operated

under the name of Rucker Brothers, Lake Stevens, Washington.

Each of the petitioners entered into written stipulations with the respondent as follows:

[14] 1.

That the Commissioner of Internal Revenue in determining the net income of the above-named taxpayer for the year 1919, included in said income one-half of the net income of the partnership of Rucker Brothers for the year 1919.

2.

That the Commissioner of Internal Revenue in the 60-day statutory deficiency letter determined the net income of the above-named taxpayer for the year 1919 to be \$117,180.40.

3.

Included in the determination of the net income of the above-named taxpayer for the year 1919, there was an amount of \$108,345.65 which represented one-half of the net income of Rucker Brothers partnership for the year 1919.

4.

That the Commissioner of Internal Revenue erred in the determination of the net income of Rucker Brothers partnership for the year 1919 by including in income \$13,805.10 representing "Inventory Wire Rope at Camps" as alleged in error No. 1 of the taxpayer's petition.

5.

That the Commissioner in the determination of the net income of the partnership of Rucker Broth-

ers for the year 1919, did not err in adding to the income \$11,143.19 on account of "Stumpage Disallowed Camp Boulder" as alleged in error No. 2 of the taxpayer's petition.

6.

That the Commissioner of Internal Revenue in the determination of the net income of the partnership of Rucker Brothers for the year 1919 did not err in adding to the income \$12,149.29 on account of "Stumpage Disallowed Camp Silverton" as alleged in error No. 3 of the taxpayer's petition.

[15] 7.

That the Commissioner of Internal Revenue in the determination of the net income of Rucker Brothers partnership for the year 1919 erred in the addition to the income of the partnership of \$22.55 on account of "Stumpage Disallowed Camp Cavano"; that the correct amount to be added is \$19.10; that the income of the partnership of Rucker Brothers for the year 1919 should be decreased by \$3.45 on account of this discrepancy as alleged in error No. 4 of the taxpayer's petition.

8.

That the Commissioner of Internal Revenue erred in adding to the income of the partnership of Rucker Brothers for the year 1919, \$905.33 on account of "Loss on Sale of Bonds" as alleged in error No. 5 in the taxpayer's petition.

9.

That the loss sustained by Rucker Brothers partnership for the year 1919 on account of "Sale of

Bank Stock" was \$704.67; that the Commissioner of Internal Revenue added to the income of the partnership of Rucker Brothers for the year 1919, \$2,704.67; that \$2,000.00 of the amount of \$2,704.67 alleged in error No. 5 of the taxpayer's petition as a loss on the sale of bank stock was properly added to the income of Rucker Brothers partnership for the year 1919 by the Commissioner of Internal Revenue.

10.

That the 60-day statutory deficiency letter reflects profits from the sale of timber to the Panther Lake Company by Rucker Brothers partnership in the year 1919 of \$31,598.39; that a correct determination of said profits from said sale of timber is \$27,000.02; that the net income of Rucker Brothers partnership for the year 1919 should be decreased by \$4,598.37 on account of the adjustment in the determination of the profits from the sale of timber in 1919 to the Panther Lake Company by Rucker Brothers partnership as alleged in Error No. 6 in the taxpayer's petition.

11.

That the Commissioner of Internal Revenue erred in the determination of the income of the partnership of Rucker Brothers partnership for the year 1919 by including \$2,633.50 as income on [16] account of "Supply Inventories" as alleged in error No. 7 in the taxpayer's petition.

12.

That the Commissioner of Internal Revenue in the determination of the net income of Rucker

Brothers partnership for the year 1919 deducted from income \$73.60 on account of interest paid; that the correct deduction on account of interest paid is \$673.60; that the net income of Rucker Brothers partnership for the year 1919 should be decreased \$600.00 on account of this discrepancy as alleged in error No. 8 of the taxpayer's petition.

Since the above stipulation disposes of all the allegations of error in the case of W. J. Rucker and since the facts hereinafter recited are with respect to the case of B. J. Rucker, we shall sometimes for convenience, refer to him as Rucker.

B. J. Rucker was married in December, 1904, and he has lived continuously with his wife since that time. At the time of his marriage Rucker owned a one-half interest in the copartnership of Rucker Brothers, the assets of which consisted of lands and town lots and some shares of stock in the Rucker Bank. Rucker Brothers were engaged in the real estate business at the time of Rucker's marriage, but in 1907 or 1908 the firm entered into the logging and sawmill business. The lands and town lots owned by the partnership at the time of Rucker's marriage were nonproductive properties from which there has been no income from the time of his marriage to the present time. In fact they have paid in taxes several times what the property would sell for to-day.

The profits earned by the partnership of Rucker Brothers have come from enterprises they have engaged in, such as timber and sawmill and logging operations for which the firm borrowed money and

started. They [17] have bought most of their timber on the installment plan, making only a small initial payment therefor.

Rucker has kept no record of the property he had at the time he was married, nor of what he has accumulated subsequently to marriage.

Rucker Brothers purchased a quantity of timber from the Puget Mill Company in 1917 at a total purchase price of \$625,000 for which they paid \$5,000 in cash and the balance of \$620,000 in promissory notes extending over a period of several years, all of which notes were signed by W. J. and B. J. Rucker for the partnership. A portion of that timber was later sold at a profit of upward of \$80,000. The portion of that timber that was not sold was cut and sawed at their own sawmill and was paid therefor as it was cut and removed.

During the period 1907 to 1916 the firm of Rucker Brothers borrowed several sums of money for use in the partnership.

All of Rucker's property at the time of his marriage was his equity in the partnership and all of his income has been from the partnership distributions.

Rucker filed an individual income tax return for the year 1919 on March 15, 1920, showing therein as his share of the partnership distribution \$62,741.12, also salary received from the partnership of \$9,000, making a total net income reported of \$71,741.12.

Mrs. B. J. Rucker had no separate property in 1919. Mrs. Rucker filed an individual income tax return for the year 1919 on May 5, 1921, reporting

\$35,870.56, one-half of the total income reported by Rucker in his original return. On May 5, 1921, Rucker himself filed an amended individual income tax return showing therein one-half of the total net income reported by him in his individual return of \$35,870.56.

[18] OPINION.

MORRIS.—All of the issues raised by the petition of W. J. Rucker, Docket No. 3508, and eight of the issues raised by the petition of B. J. Rucker, Docket No. 3509, have been agreed upon and evidenced by written stipulation between the parties set forth herein in the findings of fact and will be settled in accordance therewith.

The sole question remaining for determination is whether the respondent correctly held that the entire distributive share of the income of B. J. Rucker in the partnership of Rucker Brothers was separate property or whether said distributive share was community income under the laws of the State of Washington.

Sections 6890, 6891, and 6892, respectively, of Remington's Compiled Statutes of Washington, 1922, are as follows:

Property and pecuniary rights owned by the husband before marriage, and that acquired by him afterward by gift, bequest, devise or descent, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber or devise by will, such property without the wife joining in such manage-

ment, alienation, or encumbrance, as fully and to the same effect as though he were unmarried.

The property and pecuniary rights of every married woman at the time of her marriage, or afterward acquired by gift, devise, or inheritance, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber or devise by will such property, to the same extent and in the same manner that her husband can, property belonging to him.

Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.

[19] Thus it will be seen that under the law of the State of Washington governing the question in controversy the "property and pecuniary" rights of the husband and wife are definitely settled and that "property" owned by them at the time of marriage together "with the rents, issues, and profits thereof" shall be their separate property, and that the property not so owned, but acquired subsequently to marriage with the designated exceptions is "community property."

The testimony reveals that Rucker was a member of the partnership of Rucker Brothers prior to 1904 and that he continued to be a partner up to and during the period in question; that he was married in December, 1904, and has continuously lived with his wife; that all of his income has been derived from salaries of the partnership and partnership distributions.

In the Appeal of Julius and Rebecca B. Shafer, 2 B. T. A. 640, we held that the decisions of the Supreme Court of Washington lay down the rule that where business income was produced in part by separate property and in part by the efforts of the community, and each of these two factors was substantial, the Court will attempt to allocate such earnings, but if it appears that the income is to be attributed primarily to one element, the other element may be disregarded. The Supreme Court of the State of Washington, in the case of Brown's Estate, 214 Pac. 10, has summarized some of the more important rules of the courts of that State for determining the status of community or separate property:

1. The presumption is that property acquired during coverture is community property, and the burden is upon the person claiming it to be separate property to establish that as its character.

- [20] 2. The status of property is to be determined as of the date of acquisition. This rule is equally true with regard to personal property as with real property.

3. If property is once shown to have been separate property, the presumption continues that it is separate until overcome by evidence. Separate property continues to be separate through all its changes and transitions, so long as it can be clearly traced and identified.

4. The rents, issues, and profits of separate property remain separate property and profits resulting from money borrowed on separate credit are separate property.

5. Separate property may lose its identity as such by being consolidated with community property.

The argument of petitioner's counsel that the distributive share of Rucker in the partnership is from services rather than from property is considerably weakened by the fact that he received a salary of \$9,000 for the taxable year, which amount it is reasonable to assume, was the value placed upon his services by the partnership. Of course personal services must necessarily play an important part in the conduct of any business, but where the parties have themselves appraised the value of those services, we could not with the meager amount of evidence before us say that his services were worth any greater amount.

Applying the principles announced in the case of *In re Brown's Estate*, *supra*, to the instant facts we are led to the conclusion that the income is to be attributed primarily to separate property. There is no question that the interest owned by Rucker in the partnership at the time of his mar-

riage was separate property under the above quoted provisions of the Washington statute. The fact that the partnership interest was separate property, "the presumption continues that it is separate until overcome by evidence" and it "continues to be separate through all its changes and [21] transitions, so long as it can be clearly traced and identified." There is no doubt that the property in question can be clearly traced and identified.

The evidence introduced affecting that presumption was that the only assets owned by the partnership at the time of his marriage consisted of lands and town lots and some shares of Rucker Bank stock, and that such lands and town lots were non-productive, and were a liability rather than an asset. We are not told anything at all about the value of the bank stock, which for all we know may have been considerable. About 1907 or 1908 the partnership engaged in the sawmill and lumbering business and borrowed the money to establish and carry on that business and continued to borrow money to be used in their operations. In 1917 a large tract of timber was purchased, only \$5,000 in cash being paid therefor, the balance of the purchase price being evidenced by promissory notes. These notes were signed by W. J. and B. J. Rucker for, and in the name of Rucker Brothers. Other notes were executed by one or both of them for funds borrowed for the use of the partnership. The profits from these transactions resulted from money borrowed on separate credit and are therefore separate property. In *re Brown's Estate, supra*. In

the Appeal of Julius and Rebecca B. Shafer, *supra*, in which case the income was derived from the sale of merchandise purchased with the separate property of Shafer or on the credit of the partnership, the services rendered being incidental to the profits, we held:

Upon this basis there can be no presumption that the profits are to be attributed entirely to the services rendered by the community; that presumption has been overcome by the evidence, and if there is now any presumption it would be that this appeal fell within the decision *In re Brown's Estate, supra*, that it was the separate property which was the primary source of the profits.

[22] We are therefore of the opinion that the primary source of the profits in the instant case was Rucker's separate property, and that he is taxable on his distributive share of the partnership income.

Reviewed by the Board.

Judgment will be entered on 15 days' notice

under Rule 50.

Now, October 31, 1928, the foregoing findings of fact and opinion certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[23] A true copy:

Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 3509.

B. J. RUCKER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER OF REDETERMINATION.

Pursuant to the Board's findings of fact and opinion, promulgated December 27, 1927, the parties filed proposed redeterminations which came on for hearing on settlement, March 8, 1928, at which time the proposed redeterminations were taken under advisement. Due consideration having been given thereto, and it appearing that petitioner has failed to compute the deficiency in accordance with our findings of fact and opinion, and the respondent's computation showing the correct tax liability for 1919 to be \$34,491.12, the tax previously assessed to be \$17,189.27 less \$6,583.41 previously allowed, it is

ORDERED AND DECIDED: That, upon re-determination, there is a deficiency of \$23,885.26 for 1919.

(Signed) LOGAN MORRIS,

Member, U. S. Board of Tax Appeals.

Entered Mar. 20, 1928.

Now, October 31, 1928, the foregoing order of re-

determination certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[24] Filed Sep. 14, 1928. United States Board of Tax Appeals.

In the United States Circuit Court of Appeals for the Ninth Circuit.

— Term, 1928.

No. —.

B. J. RUCKER,

Petitioner,

vs.

DAVID H. BLAIR, Commissioner of Internal Revenue,

Respondent.

PETITION TO REVIEW DECISION OF
UNITED STATES BOARD OF TAX AP-
PEALS.

To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

Your petitioner, B. J. Rucker, respectfully represents that he is a resident and citizen of the city of Everett, county of Snohomish, and State of Washington.

I.

NATURE OF CONTROVERSY.

1. On the twenty-seventh day of December, 1927, the United States Board of Tax Appeals promulgated its findings and opinion in the case of B. J. Rucker, Petitioner, vs. David H. Blair, Commissioner of Internal Revenue, respondent, Docket #3509, in which opinion it was held that all of petitioner's distributive share of the income of Rucker Bros. partnership for the year 1919, was petitioner's separate income and no part thereof was community income of said petitioner and his wife, Ruby Rucker.

2. On March 20, 1928, the United States Board of Tax Appeals entered its final order of re-determination of the tax liability of said petitioner for the year 1919, based on said opinion.

II.

ORDER OF REVIEW.

A review of the decision of the United States Board of Tax Appeals in the above-entitled proceeding is sought by the United States Circuit Court of Appeals for the Ninth Circuit.

III.

ASSIGNMENTS OF ERROR.

Your petitioner says that in the record and proceedings of said United States Board of Tax Appeals, in the above-entitled cause and in the final order entered therein, there is manifest error, and for error petitioner assigns the following:

1. The Board erred in holding that all of the said petitioner's distributive share of the income of Rucker Bros. for the year 1919 was the separate income of the petitioner.

[25] 2. The Board erred in failing to hold that all of the said petitioner's distributive share of the income of Rucker Bros. for the year 1919 was community income of the said petitioner and his wife.

3. The said findings of fact promulgated by the Board are concurred in by the petitioner, but the Board erred in its conclusions.

Your petitioner, therefore, prays for review, by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the United States Board of Tax Appeals in the above-entitled case, in accordance with the Act of Congress in such case made and provided, and that the Clerk of said Board be directed to transmit and deliver to the Clerk of said court certified copies of all and every of the documents listed and set forth in the rules adopted by said United States Circuit Court of Appeals for the Ninth Circuit providing for the presentation of petitions for review of decisions.

And he will ever pray, etc.

B. J. RUCKER.

State of Washington,
County of Snohomish,—ss.

Personally appeared before me the subscribed, a notary public in and for said county, B. J. Rucker, petitioner above named, who, being duly sworn according to law, does depose and say that the facts

set forth in the foregoing petition are true and correct.

B. J. RUCKER.

Sworn and subscribed before me this 6th day of Sept., 1928.

W. P. BELL,
Notary Public.

Now, October 31, 1928, the foregoing petition for review certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[26] Filed Oct. 4, 1928. United States Board of Tax Appeals.

Before the United States Board of Tax Appeals.

DOCKET No. 3509.

B. J. RUCKER

vs.

COMMISSIONER OF INTERNAL REVENUE.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and, within sixty days from the date of the filing of the petition for review in the above-stated case, transmit to the Clerk of the United States Circuit Court of Appeals for

the Ninth Circuit certified copies of the following documents:

1. The docket entries of proceedings before the United States Board of Tax Appeals in the case above entitled.
2. Findings of fact, opinion, and decision of the Board.
3. Order of redetermination and final decision.
4. Petition for review.

The foregoing to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

W. P. BELL.

W. P. BELL,

Everett, Wash.,

Attorney for B. J. Rucker.

J. B. FOGARTY.

J. B. FOGARTY,

Everett, Wash.,

Attorney for B. J. Rucker.

September 28, 1928.

[27] Filed Oct. 4, 1928. United States Board of Tax Appeals.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

— Term, 1928.

DOCKET No. 3509.

B. J. RUCKER,

Petitioner,

vs.

DAVID H. BLAIR, Commissioner of Internal
Revenue,

Respondent.

NOTICE OF FILING AND SERVICE OF
PRAECIPE FOR TRANSCRIPT OF REC-
ORD.

To David H. Blair, Commissioner of Internal Reve-
nue:

You are hereby notified that the petitioner above named has filed with the United States Board of Tax Appeals his praecipe for the record of certain parts of the proceedings in the above-entitled action, to be used in the review of the decision of the United States Board of Tax Appeals in the United States Circuit Court of Appeals for the Ninth Circuit and a full, true and correct copy of said praecipe is herewith served upon you.

W. P. BELL,

W. P. BELL,

Everett, Washington,
Counsel for Petitioner.

J. B. FOGARTY.

J. B. FOGARTY,
Everett, Washington,
Counsel for Petitioner.

Service of the foregoing notice is herewith admitted and a copy thereof received together with copy of praecipe in the above-named case.

C. M. CHAREST.

M

Dated this 3d day of October, 1928.

Now, October 31, 1928, the foregoing praecipe and notice of filing certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[Endorsed]: No. 5663. United States Circuit Court of Appeals for the Ninth Circuit. B. J. Rucker, Petitioner, vs. David H. Blair, Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petition to Review Order of the United States Board of Tax Appeals.

Filed December 20, 1928.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

